SUPREME COURT OF FLORIDA
Case Number SC00-317

MARK EVAN OLIVE,

Appellant/Cross-Appellee,

v.

ROGER R. MAAS, in his official capacity as Executive Director of the Commission on Capital Cases, and ROBERT F. MILLIGAN, in his official capacity as the Comptroller of the State of Florida,

Appellees/Cross-Appellants.
_____/

On certification from the District Court of Appeal,
First District, of a question of great public importance

REPLY BRIEF ON CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT ROGER R. MAAS

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ARGUMENT ON CROSS-APPEAL

Issue I

The trial court erred by entering an injunction against Mr. Maas.

Mr. Olive argues that Mr. Maas was properly enjoined by the trial court from "delisting" Mr. Olive from the registry because: (1) it happened once before, and (2) Mr. Maas still maintains the registry so he could do it again. This argument fails completely under the holdings of *City of Jacksonville v. Wilson*, 157 Fla. 838, 27 So. 2d 108 (1946); *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168 (Fla. 2nd DCA 1999); *Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3rd DCA 1989). In addition, the argument rests on a misinterpretation of the facts about whether Mr. Olive's name was ever removed from the registry.

The following chronology illustrates that Mr. Olive **himself** removed his name from further consideration for appointment to represent Mr. Mungin in postconviction proceedings. When Mr. Maas subsequently sent Judge Moran a list of attorneys, without Mr. Olive's name, Mr. Maas was simply reflecting Mr. Olive's representation to the court that he had taken his own name out of consideration for further representation of Mr. Mungin. Judge Moran revoked Mr. Olive's appointment solely because of Mr. Olive's 26 February 1999 letter*;* not because of anything Mr. Maas did, as this table shows.

Date	Action
29 June 1998	Mr. Olive signed a registry application on which he certified that he would serve under the terms and conditions of Section 27.711, *Florida Statutes*. R III 446.
1 September 1998	Judge Moran entered an order appointing Mr. Olive under the terms and conditions of Section 27.711, *Florida Statutes*, to represent Mr. Mungin in his post-conviction capital collateral proceedings. R II 232.
23 September 1998	Mr. Olive wrote a letter to Judge Moran stating that once he [Mr. Olive] received and reviewed the registry contract, reviewed Mr. Mungin's case itself, and considered his own caseload, he would advise Judge Moran on whether he could ethically and practically accept the appointment. R II 172.
26 February 1999	Mr. Olive, through counsel, wrote to Judge Moran to say that "**Presently Mr. Mungin does not have counsel within the meaning of Rules 3.851 and 3.852, Florida Rules of Criminal Procedure, and Chapter 119, Florida Statutes (1998).** While an order has been entered appointing Mr. Olive, he has not accepted that appointment by entering into the necessary contract with the Comptroller or his designee." R II 236 (emphasis added). A copy of this letter was sent to Mr. Maas.
2 March 1999	Mr. Maas sent a new list of registry attorneys to Judge Moran, less Mr. Olive's name, in order that new counsel could be appointed to represent Mr. Mungin. R II 238-239.
11 March 1999	Judge Moran entered a revocation Order stating, "Mr. Olive has now tendered a letter to this Court dated February 26, 1999, through his attorney, indicating that he is unable to accept the appointment as counsel in the instant case due to his perception that his acceptance would create a conflict of interest." R II 249.

The sole reason Judge Moran made an appointment, subject to Mr. Olive's acceptance, to represent Mr. Mungin was to begin Mr. Mungin's postconviction process. If Mr. Olive represented to Judge Moran on 26 February 1999 that presently Mr. Mungin does not have counsel within the meaning of Rules 3.851 and 3.852, then both Judge Moran and Mr. Maas were required to take Mr. Olive at his word and seek new counsel for Mr. Mungin. This they did. R II 238 B 239 and R II 249. Mr. Mungin's postconviction relief had already been delayed six months (1 September 1998 to 26 February 1999).

Under the foregoing circumstances, Mr. Maas did not "delist" Mr. Olive from the registry and Judge Moran was not tricked into appointing alternative counsel for Mr. Mungin.

Issue II

> Mr. Olive had no immediate need for a declaration of his rights under Sections 27.710 and 27.711, *Florida Statutes*, and Mr. Maas is no longer a proper defendant.

Courts do not act precipitously. For this reason, Mr. Olive must show a present need for declaratory judgment. *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). At best, Mr. Olive has shown only a future need for a determination by a trial court of whether Sections 27.710 and 27.711, *Florida Statutes*, will offend the Florida Constitution. To consider how soon Mr. Olive needs judicial relief for his alleged ethical dilemma, it is first necessary to review the nature of relief he requested in his Amended Complaint. On page 17 of the Amended Complaint the trial court is asked to declare that:

> The Florida Supreme Court has exclusive jurisdiction to regulate the conduct of lawyers under Article V, Section 15, of the Florida Constitution. **Any provisions of the Registry Act and the Contract that interfere with such jurisdiction and conflict with the Rules Regulating the Florida Bar are null and void** and Plaintiff may . . . .

(Emphasis added.) Mr. Olive asked the trial court to find that the Legislature had, by enacting Sections 27.710 and 27.711, *Florida Statutes,* usurped this Court's power to regulate attorneys and interfered with the administration of justice by limiting attorneys' fees. We can only conclude that he was asking the trial court

to hold the statutes in question unconstitutional, his present assertions notwithstanding.[1] Without holding the statutes unconstitutional, the court below could not relieve Mr. Olive from the duty of executing the contract that is required by Section 27.710(4), *Florida Statutes*, and that incorporates all the statutory terms and conditions Mr. Olive challenges.

The reason Mr. Olive's challenge to the constitutionality of the statutes is premature is provided by *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. den.*, 479 U.S. 1043 (1987); *White v. Board of County Commissioners*, 537 So. 2d 1376 (Fla. 1989). All that he complains about should be resolved on a factual record before the trial court who appoints him. Had Mr. Olive accepted Judge Moran's appointment and found it necessary, for example, to challenge Mr. Mungin's alleged prior conviction, Mr. Olive could then have requested relief from Section 27.711(11), *Florida Statutes*, and his contract with the Comptroller. On the record before him Judge Moran could then have made a *Makemson* determination of whether or not the Legislature's failure to fund an attorney to attack Mr. Mungin's prior conviction unconstitutionally interfered with the administration of justice.

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[1] "Olive never sought a declaration of the Registry's Act's constitutionality, but the trial court nevertheless ruled that the Registry Act is not facially unconstitutional." Appellant's Reply Brief at 3.

On the record before it here, the trial court could do nothing more than declare the sections in question constitutional, a result Mr. Olive now finds insufficient. Had he waited until he had a proper record under the *Makemson* holdings, Mr. Olive would have given the court a foundation for a broader declaratory judgment.

Another reason why the trial court should have dismissed the Amended Complaint is that Mr. Olive holds in his own hand the answer to his ethical dilemma. He could and can withdraw from the registry at any time. Participation by registry counsel is completely voluntary. Mr. Olive did not need judicial intervention prior to signing the contract He was not in a position "between a rock and a hard place." If he feared that executing a registry contract would subject him to discipline by The Florida Bar, the only harm to himself alleged here, he can simply withdraw from the registry or decline an appointment.

Mr. Olive's present position is like that of the Marion County School Board and the Ocala City Council who wanted to meet privately with their attorneys but feared they would be prosecuted for violating the "government in the sunshine" law. They sought a declaratory judgment as to future meetings between counsel and themselves. Their suit was dismissed by the trial court, but the First District Court of Appeal reversed. It held that the plaintiff public officials were between

the proverbial "rock and a hard place." *City of Ocala v. Askew*, 336 So. 2d 139 (Fla. 1st DCA 1976). This Court reversed that holding. The fact that the public officials might fear prosecution for future meetings and had, in fact, been warned by the local state attorney about such meetings, was still insufficient to create a justiciable controversy under the declaratory relief statute. *Askew v. City of Ocala,* 348 So. 2d 308 (Fla. 1977). Here, Mr. Olive has even less of a case. The record does not show that The Florida Bar or any court ever warned him about executing a registry contract. Furthermore, The Florida Bar provides him a means to answer any ethical doubts he may have about the contract. Bylaw 2-9.4, *Bylaws of The Florida Bar*.

CONCLUSION

For the foregoing reasons, Mr. Maas respectfully requests that the judgment of the court below be affirmed as to Counts I and II of the Amended Complaint, and that Count III for a permanent injunction be dismissed. Alternatively, he requests that the case be remanded to the circuit court with directions to grant Appellees/Cross-Appellants' Motions to Dismiss.

CERTIFICATE OF SERVICE

Respectfully submitted on this ____ day of May 2000, on which date this Reply Brief, formatted in Times New Roman, 14 points, was served by United States mail on the counsel listed below.

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